Supreme Court, U.S.
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No. 10

IN THE
Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the political question doctrine bars judicial review of statutorily authorized challenges to allegations by government officials that an individual has engaged in terrorism-related activities.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below are identified in the caption of the case.

Petitioner El-Shifa Pharmaceutical Industries Company has no parent corporation and no publicly held corporation has a 10% or greater ownership interest in El-Shifa Pharmaceutical Industries Company.

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OPINIONS BELOW

The opinion of the *en banc* court of appeals (Pet. App. 1a–48a) is reported at 607 F.3d 836. The panel opinion of the court of appeals (Pet. App. 49a–76a), which was vacated by order of the court (Pet. App. 100a–101a), is reported at 559 F.3d 578. The district court's memorandum opinion dismissing the complaint for lack of subject-matter jurisdiction (Pet. App. 84a–99a) is reported at 402 F. Supp. 2d 267. The district court's memorandum order denying Petitioners' motion to alter judgment (Pet. App. 77a–82a) is unreported but available electronically at 2007 WL 950082.

JURISDICTION

Petitioners seek review of a final decision of the court of appeals entered on June 8, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the application of the political question doctrine to bar review of claims brought pursuant to 5 U.S.C. § 702, which provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or

that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

STATEMENT OF THE CASE

Petitioners seek review of the D.C. Circuit's decision that the political question doctrine bars judicial review of allegations by government officials that Petitioner Salah Idris was a supporter and financier of terrorism-related activities. The court held these allegations nonjusticiable because they were offered as justification for an earlier military strike on a pharmaceutical plant owned by Mr. Idris.

A. Statement of Facts

Petitioners and the El-Shifa Plant — Salah Idris is a successful businessman, originally from Sudan, who became a prominent bank official and citizen of Saudi Arabia. Pet. App. 105a, 108a. Mr. Idris is engaged in business and investment activities in many countries throughout the world, including the United States. Pet. App. 105a. At the time of the events at issue here, Mr. Idris was a well-known supporter of an opposition party within Sudan and regularly wrote columns critical of the Sudanese

government in a newspaper based in Egypt, where he maintained a residence. Pet. App. 119a, 127a–128a. Notwithstanding his differences with the Sudanese government, Mr. Idris made investments in his native Sudan to help alleviate the suffering of its impoverished people. Pet. App. 108a. In March 1998, Mr. Idris purchased Petitioner El-Shifa Pharmaceuticals Industry Company ("El-Shifa") for approximately $18 million. *Id.*

Petitioner El-Shifa is a Sudanese corporation that, before August 20, 1998, operated a pharmaceutical plant near Khartoum in Sudan. Pet. App. 105a–107a. The plant was small and unsophisticated by Western standards, lacking the capacity to manufacture pharmaceuticals from raw chemicals. Pet. App. 106a, 120a–122a. The plant instead was dedicated to repackaging into finished consumer products (*e.g.*, tablets and capsules) pharmaceuticals produced abroad and imported in bulk form. Pet. App. 106a. The plant produced over half of the human and veterinary medicines distributed in Sudan and an even greater percentage of the antibodies used to treat malaria, Sudan's leading cause of death. *Id.* This facility thus served vital humanitarian purposes in Sudan, which is one of the poorest countries in the world. Pet. App. 105a–106a.

Because the plant was one of the few modern facilities in Sudan, it was a source of public pride that was frequently shown to foreign visitors. Pet. App. 109a. These visitors, including Americans and other Westerners, were given the run of the entire plant, which had little security beyond a simple six-foot-tall fence. Pet. App. 109a, 117a, 120a–122a. In addition, a regional development bank that had made

a large loan to El-Shifa frequently sent auditors to monitor the loan and inspect the plant's operations. Pet. App. 108a–109a. None of these many visitors saw that the plant was anything other than what it purported to be: a pharmaceutical repackaging facility. Pet. App. 109a, 117a, 120a–122a.

The Destruction of the El-Shifa Plant — In August 1998, approximately five months after Mr. Idris purchased El-Shifa, U.S. embassies in Kenya and Tanzania were bombed by terrorists associated with Osama bin Laden. Pet. App. 109a–110a. On August 20, 1998, the United States retaliated against these attacks by launching cruise missiles on training camps in Afghanistan operated by groups affiliated with bin Laden. Pet. App. 2a–3a. On the same day, the United States also launched cruise missiles at the El-Shifa plant. *Id.* As President Clinton told the nation that day, the plant was targeted for destruction because the United States believed at the time that the plant was being used to produce materials for chemical weapons. Pet. App. 111a–112a. This charge was based on evidence from a soil sample supposedly obtained from the area by an Egyptian operative several months before the plant was purchased by Mr. Idris. Pet. App. 111a–115a. Government officials also claimed at the time of the attack that the plant did not produce any commercial products, was protected by unusual security measures, and was owned by the government of Sudan, and that bin Laden had a direct financial interest in the plant. Pet. App. 115a–118a.

The destruction of the plant triggered a firestorm of criticism, as journalists quickly uncovered substantial evidence that the plant was a legitimate,

privately owned pharmaceutical plant that provided critical medicines, lacked any ties to bin Laden, and could not have been involved in the production of chemical weapons. Pet. App. 120a–123a, 131a; *see also* Pet. App. 124a–125a (government concessions that it had been mistaken about the plant's purported lack of commercial products, about the supposed direct financial relationship between the plant and bin Laden, and about the plant's purported ownership by the government of Sudan). Among other things, the claimed evidence of chemicals in the soil near the plant was not found in extensive post-attack testing. Pet. App. 115a. One publication noted the "growing consensus" that American intelligence had tragically erred. Pet. App. 121a. Because the attack occurred just days after President Clinton's grand jury testimony on the Monica Lewinsky matter, there was also widespread speculation that the President had launched the attack to divert attention from his embarrassing personal and political problems. Pet. App. 123a.

The Defamation of Salah Idris — In the face of this mounting criticism and to stave off further embarrassment to the administration, government officials reformulated the justification for the attack. Among other things, certain unidentified "intelligence officers" told reporters that Mr. Idris, whom the government had since learned was the plant's actual owner, was "a partner with" and a "front man or agent for" Osama bin Laden and "a financial supporter" of the terrorist groups Islamic Jihad and the National Islamic Front. Pet. App. 125a–127a. According to the officials, these allegations about Mr. Idris were based on "[n]ew evidence obtained since the attack." Pet. App. 126a.

Consistent with these public statements, the Treasury Department froze Mr. Idris's assets pursuant to its terrorism sanctions regulations. Pet. App. 128a.

In fact, these allegations were false and made with knowledge of their falsity or with reckless disregard for their truthfulness. Pet. App. 127a–128a, 136a. As Richard Clarke, then the United States' chief counter-terrorism official, subsequently admitted, the intelligence "never implicated Mr. Idris . . . in any involvement with Osama bin Laden nor any terrorist activities." Pet. App. 141a–142a; *see also* Bill Clinton, *My Life* 805 n* (Arrow Books 2005) (2004) ("[Mr. Idris's] contention [that he himself lacked any connection to al-Qaeda] has recently been supported by Dick Clarke"). Indeed, when Mr. Idris sued to unfreeze his assets, the Treasury Department responded by unblocking the accounts, thereby conceding and mooting the litigation. Pet. App. 126a. Even then, however, an anonymous "senior administration official" continued to defame Mr. Idris by stating to the press that "[t]here are things that Mr. Idris has associated himself with that I think every American would find reprehensible." Pet. App. 128a–129a.

The government's false and defamatory claims about Mr. Idris's alleged ties to terrorism severely damaged Mr. Idris's reputation and impaired his ability to engage in business and investment activities in the United States and other countries around the world. Pet. App. 136a–137a.

B. The Proceedings Below

In July 2000, Mr. Idris and El-Shifa submitted an administrative claim to the CIA seeking

compensation for the destruction of the plant and a retraction of the government's defamatory statements. Pet. App. 132a. After the CIA denied the administrative claim in March 2001, Petitioners filed this lawsuit.[1]

The complaint alleged what was denominated as a "defamation" claim against the United States seeking only non-monetary relief, including a declaration that the accusations against Mr. Idris were false. Pet. App. 136a–137a. As Petitioners explained to the district court, this "defamation" claim was asserted in the alternative under both the judicial-review provisions of the Administrative Procedure Act ("APA") and the common law. *See* Mem. Supp. Mot. Alter J. at 3–4.[2]

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[1] At the same time they submitted their administrative claim, Petitioners sued the United States in the Court of Federal Claims, seeking just compensation for the plant under the Takings Clause. The trial court held that Petitioners would have a valid Takings claim unless the plant was enemy property, but that the political question doctrine barred judicial review of President Clinton's designation of the plant as enemy property. The trial court accordingly dismissed Petitioners' lawsuit, and the Federal Circuit affirmed. *See El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004). This Court denied certiorari. 545 U.S. 1139 (2005).

[2] Petitioners also sought damages under the Federal Tort Claims Act ("FTCA") for the destruction of the plant under theories of negligence and trespass, as well as a declaration that the government violated international law by failing to compensate them after learning the plant had been targeted in error. Pet. App. 133a–135a, 137a–139a. Petitioners did not pursue their FTCA claims on appeal because of an intervening change in law regarding the FTCA's foreign-country exception. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004). Though Petitioners did pursue their law-of-nations claim on appeal, this

The district court dismissed the complaint for lack of subject-matter jurisdiction, Pet. App. 83a, 99a, concluding, among other things, that the defamation claim was barred by sovereign immunity, Pet. App. 91a. Petitioners filed a motion to alter the judgment, explaining that the defamation claim seeks "other than money damages," and therefore falls within the express waiver of sovereign immunity contained in 5 U.S.C. § 702. *See Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006) ("there is no doubt that § 702 waives the government's immunity from actions seeking relief 'other than money damages'" (internal quotation marks omitted)). The court denied the motion to alter the judgment, holding that, even assuming § 702 waived the government's sovereign immunity, the defamation claim was not reviewable because Petitioners had failed to allege final agency action. Pet. App. 79a–81a.

By a 2-1 decision, a panel of the D.C. Circuit affirmed on the alternative ground that Petitioners' defamation claim is nonjusticiable under the political question doctrine. The panel majority reasoned that the doctrine bars judicial review of "the President's battlefield decisions," and that the defamation claim presents questions "'inextricably intertwined' with the underlying decision to attack the [plant]." Pet. App. 55a–56a. Specifically, the majority asserted, the district court would need to determine the truth or falsity of the government's statements about Mr. Idris, "meaning a judicial decision for the plaintiffs

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Petition seeks review of the ruling below only to the extent it holds that the defamation claim is nonjusticiable.

would directly contradict the Clinton Administration's ultimate stated justification for launching the missile strike." Pet. App. 58a–59a.

Judge Ginsburg dissented in part. He noted that, because Petitioners allege that the defamatory statements were *post hoc* justifications having nothing to do with the decision to attack the plant, the defamation claim does not call into question the basis for the military strike. Pet. App. 67a–68a. The majority opinion must therefore mean that *all* publicly asserted justifications for military action are themselves strategic military and foreign-policy decisions categorically insulated from judicial review. Pet. App. 70a. This proposition, Judge Ginsburg observed, "is not only novel and frightening, but ignores Supreme Court precedent"—in particular, a "clear line of cases in which [the Supreme Court and the D.C. Circuit] have heard, without constitutional qualms, an individual's statutory challenge to his designation as an enemy combatant, thereby supposedly 'becoming arbiter of the President's battlefield actions.'" Pet. App. 70a, 72a–73a. Concluding that the political question doctrine is therefore inapplicable, Judge Ginsburg would have "le[ft] it to the district court on remand to address . . . in the first instance" whether Petitioners have a claim under either the common law or the APA. Pet. App. 74a.

On Petitioners' request, the D.C. Circuit vacated the panel decision and agreed to rehear the case *en banc*. Pet. App. 100a–101a. Following briefing and argument, the court again affirmed on the ground that the defamation claim presented a nonjusticiable

political question, this time dividing 5-4 on that question.

In an opinion for the court joined by four other judges, Judge Griffith "beg[a]n" with the proposition that "courts cannot reconsider the wisdom of discretionary foreign policy decisions," including the decision to launch a military attack abroad. Pet. App. 17a. The defamation claim implicated this rule, the majority reasoned, because it "would require the court to reconsider the merits of the decision to strike the El-Shifa plant by determining whether the government's justifications for the attack were false." Pet. App. 20a. Because the allegations about Mr. Idris's purported terrorist ties "closely track[ed] the President's own description of his reasons for launching the attack," the majority reasoned, "[d]eclaring these later statements [about Mr. Idris] true or false would require [the court] to make the same judgment about the President's initial justification for the attack." Pet. App. 22a–23a.

The majority opinion sought to distinguish this case from this Court's precedents permitting judicial review of the enemy status of persons seized by the U.S. military on the battlefield. Those cases do not implicate the political question doctrine, the majority reasoned, because the Suspension Clause of the Constitution "specifically contemplates a judicial role" in review of prolonged Executive detention. Pet. App. 25a. "[F]or the same reasons," the majority asserted, cases reviewing battlefield "enemy property" seizures were "not helpful" to Petitioners, since this Court "has suggested that judicial review of enemy-property designations made to effect

statutorily authorized asset seizures is constitutionally mandated." Pet. App. 26a.

Finally, the majority opinion rejected the assertion of the four concurring judges that Petitioners' defamation claim is so legally insubstantial that it should be dismissed for lack of subject-matter jurisdiction, quoting Judge Ginsburg's earlier observation that "'[s]ome of our cases do imply a plaintiff may obtain a retraction from the United States for defamation by one of its officers.'" Pet. App. 29a (quoting Pet. App. 74a).

In two separate opinions, four judges concurred in the judgment but disagreed with the majority's decision holding the defamation claim nonjusticiable. In an opinion joined by Judge Rogers, Judge Ginsburg concluded that the majority opinion "expands the political question doctrine well beyond the bounds delineated in *Baker v. Carr*, 369 U.S. 186 (1962)." Pet. App. 30a. Under *Baker*, Judge Ginsburg explained, a court must make a "'discriminating inquiry . . .' in order to detect 'a political *question's* presence." Pet. App. 31a (emphasis added). The majority opinion, by contrast, requires a court "first to identify some 'conduct' or 'decision' (the opinion alternates) constitutionally committed to the Executive and then to ask whether the plaintiff's 'claim[] . . . calls into question,' 'require[s] the court to reassess,' or is 'inextricably intertwined with' that Executive conduct or decision." *Id.* (alterations and ellipsis in original). Thus, "[u]nder the [c]ourt's new political *decision* doctrine . . . even a straightforward statutory case, presenting a purely legal question, is non-justiciable if deciding it could merely reflect adversely upon a decision

constitutionally committed to the President." Pet. App. 32a (emphasis added). "The result of staying the judicial hand" in this manner, Judge Ginsburg concluded, "is to upset rather than to preserve the constitutional allocation of powers between the executive and the legislature." Pet. App. 33a.

Judge Kavanaugh also filed an opinion concurring in the judgment. In a portion of that opinion joined by Judges Sentelle, Ginsburg, and Rogers, Judge Kavanaugh explained that "[f]ederal courts lack subject matter jurisdiction over claims that are 'so insubstantial, implausible, foreclosed by prior decisions of [the Supreme] Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" Pet. App. 34a (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998)). The defamation claim fell into this category, Judge Kavanaugh concluded, because Congress has not created a defamation cause of action against the United States and, without such a statutory right of action, a common-law claim may not be asserted against the United States. Pet. App. 35a–37a. Judge Kavanaugh also argued that a claim under the APA "would face a variety of hurdles." Pet. App. 37a n.1. As noted, however, a majority of the court expressly rejected this line of reasoning. Pet. App. 29a.[3]

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[3] In fact, numerous cases hold that the victim of a tort committed by a federal officer in his official capacity has a common-law claim for equitable relief against the United States (assuming a waiver of sovereign immunity, which is provided here by 5 U.S.C. § 702). *See, e.g., Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951) (plurality op.) (groups defamed by their inclusion on government's list of subversive organizations stated an equitable claim for "violat[ion of their] common-law right to be free from

In a portion of his concurring opinion joined only by Judge Sentelle, Judge Kavanaugh also criticized the majority's invocation of the political question doctrine, but for a different reason than Judge Ginsburg. Judge Kavanaugh emphasized that this Court "has invoked the political question doctrine only in cases alleging violations of the Constitution," and that this is not such a case. Pet. App. 41a. When applying the political question doctrine in a statutory case, Judge Kavanaugh explained, a court, by refusing to give effect to a statute regulating Executive conduct, "necessarily would be holding [as a matter of separation of powers] that Congress is

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defamation"); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) ("declaratory and injunctive relief may be obtained against defamatory statements by government officials"); *Expeditions Unlimited Aquatic Enters. v. Smithsonian Inst.*, 566 F.2d 289, 294 n.16 (D.C. Cir. 1977) (en banc) (same); *B.C. Morton Int'l Corp. v. FDIC*, 305 F.2d 692, 695–99 (1st Cir. 1962) (recognizing availability of injunctive and declaratory relief to remedy defamation by federal agency). Petitioners have also pleaded a viable claim under the APA that the CIA's refusal to retract the defamatory allegations was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *see also* Pet. App. 67a (Ginsburg, J., dissenting in part) ("the CIA had denied Idris's request for a retraction, which certainly seems to be final agency action"); *Miller v. Lehman*, 801 F.2d 492, 496 (D.C. Cir. 1986) (agency's "denial of an application for correction of . . . records is a final agency action subject to review under the standards of the [APA]"). Contrary to Judge Kavanaugh's misapprehension (Pet. App. 37a n.1), therefore, Petitioners are indeed alleging that the CIA's refusal to retract a demonstrably false defamatory statement was, among other things, arbitrary and capricious.

unable to constrain Executive conduct in the challenged sphere of action." Pet. App. 42a. Thus:

> Applying the political question doctrine in statutory cases . . . would not reflect benign deference to the political branches. Rather, that approach would systematically favor the Executive Branch over the Legislative Branch — without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues. . . .

In short, the question whether a statute intrudes on the Executive's exclusive, preclusive Article II authority must be confronted directly through a careful analysis of Article II — not answered by backdoor use of the political question doctrine, which may *sub silentio* expand executive power in an indirect, haphazard, and unprincipled manner. Pet. App. 43a–44a.

REASONS FOR GRANTING THE PETITION

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). With the political question doctrine, this Court has recognized an exceedingly narrow exception to this foundational principle and to the related rule that "federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 358 (1989). With its decision in this case, however, a narrow majority of the D.C. Circuit has "expand[ed] the political question doctrine well beyond the bounds delineated in" this Court's precedents, Pet. App. 30a (Ginsburg, J., concurring in the judgment), and, in doing so, has "*sub silentio*

expand[ed] executive power in an indirect, haphazard, and unprincipled manner," Pet. App. 44a (Kavanaugh, J., concurring in the judgment). Review is warranted to correct these profound errors in this critically important area.

I. The Decision Below Is Contrary To This Court's Precedent and Improperly Expands the Scope of the Political Question Doctrine

1. The decision below directly and irreconcilably conflicts with this Court's recent jurisprudence holding justiciable lawsuits challenging the factual basis for the government's designation of persons as enemy combatants, even where those lawsuits "call[] into question," "require the court to reassess," and are "inextricably intertwined with" (Pet. App. 13a, 15a, 25a) the justifications for prior military and battlefield decisions.

The political question doctrine focuses primarily on whether resolution of a disputed issue would require a court to make "policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Because the doctrine is one of "political questions" not "political cases," its application requires a "discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action." *Baker v. Carr*, 369 U.S. 186, 211–12, 217 n.21 (1962).

Applying these principles here, the majority below began with the proposition that the political question doctrine would bar a court from passing judgment on the "wisdom" of the President's decision to bomb the El-Shifa plant. Pet. App. 17a. According to the majority, it follows that a court would also be precluded from passing judgment on the accuracy of the facts on which that military decision was based. Pet. App. 17a–18a. And it follows further, the majority reasoned, that a challenge to the government's subsequent designation of Mr. Idris as a supporter of terrorism is likewise nonjusticiable because that designation "essentially repeat[ed] the President's initial justification for the strike," Pet. App. 22a–23a, and, as a result, "[a] court's pronouncement that [Mr. Idris] had no financial ties to bin Laden would directly contradict the government's justification for the attack," Pet. App. 24a.[4]

This reasoning cannot be reconciled with this Court's recent detainee cases. After September 11, 2001, the government argued that "[t]he 'enemy' status of aliens captured and detained during war is a quintessential political question on which the courts respect the actions of the political branches." Brief for the Respondents at 35, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 425739, at *35; *see also id.* at 37 (because "active fighting is still

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[4] The majority's conclusion that the allegations about Mr. Idris "essentially repeat" the initial justification for the strike (Pet. App. 22a–23a) is incorrect. *See supra* pp. 4–6 (describing how government's publicly asserted justifications evolved over time); Pet. App. 110a–127a (same). For the reasons explained herein, however, the decision below is grievously wrong even assuming the majority is correct on this point.

ongoing in Afghanistan and elsewhere . . . this litigation implicates political questions that the Constitution leaves to the President"). This Court rejected these arguments and has endorsed judicial review of enemy-status designations of persons seized by U.S. military forces on active battlefields. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The petitioner in *Hamdi*, for instance, had been detained by government officials in the course of the United States' military operations in Afghanistan, and the "sole evidentiary support" for his ongoing detention was the affidavit of an official "familiar with the facts and circumstances related to [Hamdi's] capture . . . and his detention by U.S. military forces." 542 U.S. at 510, 512 (plurality op.). Despite the fact that the asserted justification for imprisoning Hamdi was thus *identical* to the justification for the battlefield decision to capture him, this Court nevertheless rejected the government's contention that the Judiciary could not review the accuracy of the government's subsequent classification of Hamdi as an enemy combatant to justify his continued imprisonment. *Id.* at 535–36. Separation of powers, the Court noted, would be "turn[ed] . . . on its head" were the Judiciary to be precluded from assessing "the factual basis for" the enemy-combatant designation. *Id.* at 536–37. As the court below has itself recognized, *Hamdi* thus "unequivocally rejects" the contention that the political question doctrine "preclude[s] courts from inquiring into the factual basis of an enemy combatant designation," *Omar v. Harvey*, 479 F.3d 1, 10 (D.C. Cir. 2007), *rev'd sub nom. on other grounds*, *Munaf v. Geren*, 553 U.S. 674

(2008), even where the designation "essentially repeats the . . . initial justification" (Pet. App. 22a) for a capture and detention on a foreign battlefield.[5]

Under a straightforward application of *Hamdi* and its progeny, a challenge to the accuracy of facts offered to justify a prior military decision is justiciable, even though a judicial decision for the plaintiff "would directly contradict the government's justification for" (Pet. App. 24a) the military decision. Thus, just as Hamdi's claim that he was not an enemy combatant was justiciable even though a judgment in Hamdi's favor would have "contradicted" the military's justification for its battlefield seizure of him, Petitioners' claim that Mr. Idris was not a supporter of terrorism is justiciable even though a judgment in Mr. Idris's favor would (in the same sense of the word) "contradict" the government's justification for its destruction of the El-Shifa plant.

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[5] Though the detainee cases sharply divided this Court in other respects, the ruling on justiciability commanded broad support. *But see Hamdi*, 542 U.S. at 585–86 (Thomas, J., dissenting) ("we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches"). In this respect, *Hamdi* simply affirms a long tradition of judicial review of enemy and enemy-property designations arising out of battlefield decisions during earlier wars. *See, e.g.*, *Bond v. United States*, 2 Ct. Cl. 529, 535 (1866) (adjudicating that claimant "has never given aid or comfort to the recent rebellion" and ordering compensation for property seized by military); *Harrison v. United States*, 6 Ct. Cl. 323, 327 (1870) (determining that nonresident aliens had not aided the Confederacy and ordering compensation for property seized by military); *La Plante v. United States*, 6 Ct. Cl. 311, 321–23 (1870) (same); *Hill v. United States*, 8 Ct. Cl. 470, 471–72 (1872) (same).

The majority below attempted to distinguish the detainee cases on the ground that review of Executive detention is constitutionally committed to the Judiciary by the Suspension Clause. Pet. App. 25a–26a. But this purported distinction misconstrues the nature of the inquiry under the political question doctrine. As explained above, that inquiry is not whether a particular case or a particular exercise of executive authority is within the competency of the Judicial Branch to review, but whether a "particular question posed" is. *Baker*, 369 U.S. at 211. And the "particular question posed" by this case—whether the evidence supports an official allegation that a certain individual is an enemy of the United States engaged in terrorism-related activities—is *the exact same* question posed in the detainee cases. In all relevant respects, therefore, this case is indistinguishable from *Hamdi*.[6]

2. Review is also warranted because, as Judge Kavanaugh explained, the majority below improperly applied the political question doctrine to preclude judicial review of a non-constitutional question. Pet.

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[6] The decision below also cannot be reconciled with *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). *Hutchinson* involved the Speech and Debate Clause, which, like the political question doctrine, prevents courts from passing judgment on acts constitutionally committed to the Legislative Branch. In *Hutchinson*, this Court held that although a senator cannot be sued for defamatory statements in a speech given on the floor of the Senate, he nevertheless "may be held liable for republishing [those] defamatory statements" in press releases and newsletters. *Id.* at 127–28. *Hutchinson* thus recognizes a constitutionally significant distinction between nonjusticiable activities and "relat[ed]" conduct and statements (*id.* at 131) that "tell the public about [the nonjusticiable] activities" (*id.* at 133).

App. 41a (Kavanaugh, J., concurring in the judgment) ("The Supreme Court has never applied the political question doctrine in a case involving alleged *statutory* violations. Never."); *see also Bredesen v. Rumsfeld*, 500 F. Supp. 2d 752, 762 (M.D. Tenn. 2007) ("it is well-settled that the political question doctrine applies only to constitutional questions, not to questions of statutory violations").

Properly understood, the political question doctrine bars judicial involvement in determining the parameters of certain *constitutional* powers, rights, duties, and privileges, either where the Constitution itself commits determination of those matters to one of the political branches or where the constitutional question at issue is otherwise unfit for judicial decision. The doctrine thus recognizes that in some instances Congress or the President, rather than the Judiciary, will be the final expositor of a constitutional provision. "The political question doctrine," in other words, "reflects a constitutional design that does not require the judiciary to supply the substantive content of all the Constitution's provisions." Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum. L. Rev. 237, 239 (2002). *See generally id.* at 239–73 (tracing the doctrine's development).

Thus, this Court has consistently invoked the political question doctrine *only* to prevent the Judiciary from deciding particular *constitutional* questions. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality op.) ("neither Article I, § 2, nor the Equal Protection Clause, nor . . . Article I, § 4, provides a judicially enforceable limit on the political

considerations that the States and Congress may take into account when districting"); *Nixon v. United States*, 506 U.S. 224, 228–38 (1993) (meaning of the word "try" in the Constitution's Impeachment Trial Clause is nonjusticiable); *Gilligan v. Morgan*, 413 U.S. 1, 6–7 (1973) (Constitution's Militia Clause vests in the political branches responsibility for National Guard's compliance with the Due Process Clause); *Coleman v. Miller*, 307 U.S. 433, 452–54 (1939) (time for ratifying constitutional amendments under Article V is nonjusticiable); *Luther v. Borden*, 7 How. (48 U.S.) 1, 41 (1849) (protections afforded by Constitution's Guarantee Clause are nonjusticiable).

Academic commentators and treatise writers have likewise understood this Court's "political question" precedents to "h[o]ld that certain allegations of *unconstitutional* government conduct should not be ruled on by the federal courts" and "that *constitutional* interpretation in these areas should be left to the politically accountable branches." Erwin Chemerinsky, *Constitutional Law* § 2.8.1, at 129 (3d ed. 2006) (emphases added); *see also* 1 Laurence H. Tribe, *American Constitutional Law* § 3–13, at 367 (3d ed. 2000) ("[o]ne conventional view of the [political question] doctrine grounds it in the assumption that there are certain *constitutional* questions which are inherently non-justiciable" (emphasis added and other emphasis removed)); *id.* at 385 (doctrine "require[s] federal courts to determine whether *constitutional* provisions which litigants would have judges enforce do in fact lend themselves to interpretation as guarantees of enforceable rights" (emphasis added)); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 Yale L.J. 597, 599 (1976) ("a political question is one in which

the courts forego their unique and paramount function of judicial review of *constitutionality*" such that "some *constitutional* requirements are entrusted exclusively and finally to the political branches of government for 'self-monitoring'" (emphases added)); Barkow, *supra*, at 239–40.

As Judge Kavanaugh explained, there is "good reason" that this Court's application of the political question doctrine has been limited to constitutional questions. Pet. App. 42a. Where a litigant invokes a constitutional right or privilege, or seeks to limit the exercise of a governmental actor's constitutional powers or prerogatives, a court must determine whether the Constitution itself, as the source of that right, privilege, power, or prerogative, permits or precludes a judicial role in deciding the question raised. By contrast, where a litigant invokes a statutory right of action against the government, *Congress* in the exercise of its lawmaking power has made the determination that the matter at issue is appropriate for judicial review. To hold such a matter nonjusticiable, therefore, a court must necessarily conclude that Congress exceeded its own powers when it authorized the courts to act.

A court's failure to give effect to a statute regulating Executive conduct thus amounts to an implicit holding that Congress's attempt to "constrain Executive conduct in the challenged sphere of action" violates the separation of powers. Pet. App. 42a. And while there may be instances in which a congressionally authorized right of action does impermissibly intrude upon the Executive's constitutional authority, courts must scrutinize such claims under the rubric of separation of powers, and

the Executive must shoulder the heightened legal and political burdens of prevailing in an inter-branch dispute. Holding such matters nonjusticiable under the political question doctrine thus is not "benign deference" to the political branches, but rather is an approach that "systematically favor[s] the Executive Branch over the Legislative Branch — without the courts' acknowledging as much or grappling with the critical separation of powers and Article II issues." Pet. App. 43a; *see also* Pet. App. 33a ("[t]he result of staying the judicial hand is to upset rather than preserve the constitutional allocation of powers between the executive and the legislature").

The opinion below departs from these fundamental principles. This case involves no claim by Petitioners of any constitutional right and no allegation that the President or any other officer exceeded his constitutional authority. Rather, Petitioners' defamation claim relies on the APA's statutory cause of action for review of agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and (in the alternative) on the APA's waiver of the United States' sovereign immunity from common-law claims for non-monetary relief arising out of torts committed by federal officers. *See supra* pp. 8, 13 n.3. And Petitioners seek, not the resolution of any question of constitutional law, but a ruling on the factual accuracy of the government's claims about Mr. Idris. Though it has not yet done so, the United States is entitled to argue that Congress violated the separation of powers in making these causes of action applicable to this lawsuit. But the political question doctrine does not render the lawsuit nonjusticiable.

3. In sum, the majority below misapplied the political question doctrine in a manner that both conflicts with this Court's recent detainee cases and improperly precludes judicial consideration of a non-constitutional question. The Court should grant certiorari to review and correct these fundamental errors.

II. The Decision Below Will Have Important and Far-Reaching Consequences

"'[W]hat is at stake'" in this case "'is the equilibrium established by our constitutional system.'" Pet. App. 44a (Kavanaugh, J., concurring in the judgment) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)). The decision below expands this Court's narrow political question doctrine in a manner that threatens individual liberty and upsets the separation of powers between the three Branches.

The notion that courts are categorically precluded from assessing the validity of accusations made by the government against its own citizens and other individuals whenever the accusations are claimed to be a justification for a prior military, national-security, or foreign-policy decision is a "frightening" proposition. Pet. App. 70a (Ginsburg, J., dissenting in part). This is so because the government's incentives to dissemble and lie—and to falsely malign whistleblowers, political opponents, unpopular groups, and innocent bystanders—are at their zenith precisely where (as in this case) officials seek to protect themselves from political fallout by covering up embarrassing errors and missteps in politically sensitive areas. History is filled with examples of such abuses, from the McCarthy-era Attorney

General's List of Subversive Organizations, *see McGrath*, 341 U.S. at 126–29 (plurality op.), to more recent events like the leaked false charges in national-security incidents involving Steven Hatfill, *see* Scott Shane & Eric Lichtblau, *Scientist Is Paid Millions by U.S. in Anthrax Suit*, N.Y. Times, June 28, 2008, at A1; Richard Jewell, *see Reno Apologizes to Ex-Suspect in Bombing*, N.Y. Times, Aug. 1, 1997, at A10; and Wen Ho Lee, *see* Adam Liptak, *Atomic Scientist Settles Privacy Suit Against U.S.*, N.Y. Times, June 2, 2006.

The application of the political question doctrine to allegations offered in justification of national-security decisions would bar review of these and many other instances of government misconduct. And the abandonment of *Baker*'s instruction to perform a discriminating analysis of the particular *question* posed portends an exponentially greater and less predictable application of the doctrine, and will open a new avenue for the government to use "military or war objectives" to shroud abusive conduct from judicial review. Conduct that has been traditionally reviewable, including run-of-the-mill torts and non-discretionary acts like the violation of an unambiguous statutory directive will now be nonjusticiable whenever the government can show that the challenged conduct might "merely reflect adversely upon a decision constitutionally committed to the President." Pet. App. 32a (Ginsburg, J., concurring in the judgment). In light of "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them," *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976), the Court should grant certiorari and

firmly reject this extension of the political question doctrine.

Whether the political question doctrine may be used to bar judicial review of non-constitutional questions is also a matter of extraordinary importance. By applying the doctrine to preclude adjudication of a congressionally authorized cause of action challenging Executive action, the decision below improperly "loads the dice against the Legislative Branch" in cases like this one. Pet. App. 43a. "[W]here the issue pertains to separation of powers," however, "and the political branches are . . . in disagreement, neither can be presumed correct. . . . The playing field for [such a] case, in other words, [must be] a level one." *Morrison v. Olson*, 487 U.S. 654, 704–05 (1988) (Scalia, J., dissenting). The D.C. Circuit's dramatic alteration of the balance of power among the three Branches should not be implemented absent review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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